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July 19, 2004

ORIGINAL

Ms. Marlene H. Dortch Federal Communications Commission Office of the Secretary 445 12th Street SW Washington, D.C. 20554

Re: Ex Parte Presentations in Docket MB 04-64, In the Matter of Digital Output Protection Technology and Recording Method Certifications: Digital Transmission Content Protection

Dear Ms. Dortch:

This is to notify the office of the Secretary that on July 15, 2004, Jeffrey Lawrence of Intel Corporation (by telephone), Bruce Turnbull of the law firm of Weil, Gotshal & Manges representing Matsushita Electric Industrial Co., Ltd., Jennifer Coplan of the law firm of Debevoise & Plimpton representing Sony Corporation (by telephone), and the undersigned representing Hitachi, Ltd., held an *ex parte* meeting with Johanna Shelton, legal advisor to Commissioner Jonathan Adelstein. The meeting covered matters set forth in the Certification and Reply submitted by Digital Transmission Licensing Administrator in the above-captioned proceeding, and in the materials submitted herewith relating to a description of the structure and provisions of the agreements by which DTLA licenses the DTCP Specification and Necessary Claims to intellectual property rights in such Specification, and the reasons why the agreements are reasonable and nondiscriminatory.

In accordance with Section 1.1206 of the Commission rules, this original and one copy are being provided to your office, and a copy of this notice (without attachments) is being delivered by mail to Ms. Shelton.

Sincerely,

Seth D. Greenstein

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# DTCP: Pro-Competitive Licensing Strategy for Broadcast Flag

June 29, 2004

#### Overview

- The DTLA license follows a well-accepted structure that benefits adopters, content owners and consumers by minimizing license costs.
- Licenses for DTCP are offered on reasonable and nondiscriminatory terms that provide for meaningful Adopter input and limit future changes by DTLA.
- More than 90 licensees have agreed to these license terms for DTCP; hundreds more accept the same structure for other content protection technologies.

## DTLA Philosophy

- Content protection is most effective when reasonable and balanced
  - Provides incentives for studios
  - "Keep honest people honest"
  - Encoding Rules secure reasonable consumer expectations
- But, consumers are not willing to pay extra for content protection

## DTLA Philosophy

#### Therefore:

- DTLA makes DTCP available to all at low cost and shared low risk.
- License fees support development and administration, are not a "profit center."

#### **DTCP Basics**

- Jointly-developed technology Specification
- Protects digital entertainment content traversing home and personal networks
- Available for several popular interfaces (including 1394, USB, 802.11, Ethernet)
- Can interoperate with other output and recording protection technologies

- DTLA licenses the DTCP Specification to Adopters; Content Participants receive license to protect content with DTCP
- Administration Fee, small per key fee
  - DTLA does NOT charge commercial royalty rates
  - Pricing options for small and large Adopters
  - Fees may be lowered if costs decrease

- DTLA grants licenses to Necessary Claims
- Licensees covenant not to sue other licensees on their Necessary Claims
- License from DTLA and covenant from licensees have the same, narrow scope
- "Necessary Claims" are IP rights necessarily infringed by use of the Specification
  - Narrowly drawn, explicitly excludes technologies not specific to DTCP itself (e.g., MPEG, 1394, USB)

- Why include the Licensee covenant?
  - Eliminates risk of IP litigation from other DTCP licensees
  - Minimizes unanticipated costs for all licensees
  - Unfair if Licensees could charge commercial royalty rates when DTLA charges cost recovery fees for its (and the 5C companies') DTCP technology

- No prejudice from the Licensee covenant
  - Nondiscriminatory and narrow
  - Licensee has right to evaluate the Specification, and understand any potential effect of the covenant, before agreeing to it
  - No licensee has identified any actual affected necessary claim

- DTLA cannot make material mandatory
   Specification changes (§ 3.3)
  - Can map DTCP to other Interfaces
  - Optional changes have been beneficial, and are voluntary
- Licensees Participate in Change Process
  - Adopters have right to comment and propose amendments to any draft Specification change
  - Content Participants may object if change has a material and adverse effect on protection

# FCC Interest – Promoting Competition

- Approval of many technologies enables marketplace competition
- Six proposed technologies for output protection
  - DTCP, HDCP, Microsoft, RealNetworks, Thomson and TiVo
  - All effective marketplace competitors
  - Well-positioned for "convergent" CE/IT devices

## Scope of License Review

- Technologies are to be licensed on a reasonable and non-discriminatory basis.
  - Report and Order ¶¶ 53, 55
- No single, standard definition
- Typically, in FCC precedents:
  - "Reasonable" means reasonable cost
  - "Nondiscriminatory" means making the same terms available to all similarly situated parties

# DTLA Agreements are Reasonable

- Minimize cost of license
- Cost recovery, not higher commercial royalty
- Good faith efforts to reduce fees if costs drop
- Minimize IP risks
- including 5C companies, and Content "Necessary claims" from all Adopters, **Participants**
- Avoids costly litigation, patent identification or defensive review

## DTLA Agreements are Reasonable

- No Impact on Innovation
  - License and Covenant narrowly circumscribed to "Necessary Claims"
  - Freedom to use IP for other purposes
    - Complementary technologies
    - Competitive technologies
  - Adopters review full DTCP Specification before accepting Covenant obligations

# DTLA Agreements are Nondiscriminatory

- All licensees, including the 5C Companies, in each class receive same license terms
  - Including Adopter, Content Participant,
     Reseller, Tester agreements
  - Any beneficial terms from subsequent agreements will be offered to all earlier adopters

# Myth of "First Mover Advantage"

- Early stages of a rapidly-changing field
  - Robust competition
  - Ease of entry
  - Improvement in DRM technologies
- FCC should not penalize innovators for being "first"
  - Would create disincentives for inter-industry cooperation and future innovation

#### Covenants Do Not Deter Innovation

 Licensees remain free to exploit their IP for complementary, or even competing, technologies

## Covenants are Not Discriminatory

- Licensees knowingly accept DTCP license and covenant obligations
- All Licensees obtain the same freedom from IP risk, and have the same obligations

# DTCP Covenant was <u>Accepted</u> in DFAST License

- Covenant Not "Rejected" in DFAST
  - DFAST license expressly requires use of DTCP for passing Controlled Content over any 1394 output
  - PHILA similarly permits use of DTCP over any digital output for passing Controlled Content
  - No company raised any complaint about the DTLA license in Plug and Play

# DTCP is One of Many Competing Technologies

- Already six capable competitors
  - Proven track records
  - Established distribution networks
  - Well positioned for CE, IT and convergent products
- Low barriers to new entry
  - FCC Certification eases new entry
  - Use of technology for early-window content (cable, satellite, Internet) eases entry for broadcast protection
  - Interoperability promotes competition
- Robust Competition means No Market Power

#### Covenant Benefits

- Low Costs and Risks, Enabled by the Covenant, Benefit Consumers
- Minimal impact on cost of devices
- Licensees do not have to absorb high costsfor content protections (for which consumers will not willingly pay extra)
- Covenant is a standard feature in numerous content protection licenses

# Licensees Lose if License is Changed

- Cannot retroactively change 90+ licenses
- Changing the DTCP License would foist higher costs and greater risks on all other licensees
  - Costs of evaluating and licensing own portfolio
  - Costs of evaluating, licensing or defending against licensee IP claims
  - Commercial royalty charges by DTLA
- Offering Adopters a "choice" between a Covenant and Royalty is illusory

# Context for Philips' Contentions

- Of more than 90 licensees, only Philips complains to the Commission
- Philips has shown no actual harm resulting from the Covenant (though DTCP has been licensed for 5+ years)
- Philips is a licensor in technology licenses (<u>e.g.</u>, for the HDMI interface) that contain such a Covenant as the only option
- Philips argues a lack of competition to DTCP, but did not submit its own link digital output protection technology, OCPS, which it did submit to BPDG

# Requiring Interoperability is Bad Policy

- Interoperability may not be technically possible, or may not be desired by a technology proponent of a closed system
- Downstream interoperability could impair the value of the technology
  - E.g., HDCP is point-to-terminus technology
  - Linking to less robust downstream technology eliminates competitive advantages of the upstream technology
- For DTCP, could deter the use of "EPN" encoding for earlier window content

# Requiring Interoperability is Unnecessary

- The marketplace will drive interoperability
- DTLA works assiduously to facilitate approval for interoperable systems
  - DTLA has never rejected any request to interoperate with downstream technologies
  - Four have been approved, three more in process

- Any mandatory changes to the Specification (the DTCP technology itself) will not be material
- Mapping DTCP to other interfaces does not change DTCP, just as a car remains the same on a superhighway or country road

- Adopters have a right to comment and raise objections to any proposed Specification change
  - "Implementers Forum" to explain and discuss proposed changes
  - No Adopter ever has objected to a DTLA proposed change
  - Any comments received were addressed to the Adopter's satisfaction before a change became final
  - Minimum comment period is 30 days
  - Specification Changes take effect no sooner than 18 months later

- Changes made to the Compliance Rules will not materially increase the cost or complexity of implementing DTCP
  - Changes have benefited Adopters -- enabling interaction with PVRs, redundant server copies, etc.
  - Narrow exception (necessity to preserve integrity of protections offered by DTCP) enables response to technological threats, but has never been used

- Changes to the Specification will not materially and adversely affect Content Participant rights
  - Necessary to ensure protection for existing content on future devices
- DTLA assured Adopters that, despite Change Management, porting DTCP to common interfaces could easily be accomplished

## Differences in Rights Underlie Different Processes

- Content Participants' right to oppose changes (vs. Adopter comment and objection) reflects ability to respond to unacceptable changes
  - Adopters that object to license changes can cease, within 18 months, further implementation of DTCP
  - 5C companies are also Adopters, so have powerful incentives not to make changes that would harm Adopter interests
  - By contrast, even if Content Participants stop using DTCP, all content already in the market would remain exposed forever when played on future devices that incorporate the objectionable change

# Fair Treatment for All Adopters

- "Lead time" is inherent those who develop the technology know of it first – but is minimal
- Advance notice to Adopters of proposed changes
- Adopter input into draft proposal
- No change is implemented by anyone, including Founders, until after the Specification is finalized
- 18 month minimum implementation period

# Competition Among License Terms Promotes Choice

- DTCP licenses are reasonable and nondiscriminatory
- Philips notes that other agreements, such as SmartRight, Vidi, Microsoft WMDRM, have provisions that Philips prefers
- If the market agrees, those technologies should succeed
- No need for FCC to homogenize all license terms and approaches